Nos. 12,349, 12,352, 12,350

In the United States Court of Appeals

For the Ninth Circuit

TIMOTHY E. ARMSTRONG, et al., *Appellants,* vs. MATSON NAVIGATION COMPANY, a corporation, *Appellee and Cross-Appellant,* UNITED STATES OF AMERICA, *Appellee and Cross-Appellee.*	No. 12,349
JAMES KEITH CURRIE, etc., *Appellant,* vs. MATSON NAVIGATION COMPANY, a corporation, *Appellee and Cross-Appellant,* UNITED STATES OF AMERICA, *Appellee and Cross-Appellee.*	No. 12,352 CONSOLIDATED CASES
DONALD G. STEWART, et al., *Appellants,* vs. MATSON NAVIGATION COMPANY, a corporation, *Appellee and Cross-Appellant,* UNITED STATES OF AMERICA, *Appellee and Cross-Appellee.*	No. 12,350

Brief for Appellee and Cross-Appellant Matson Navigation Company

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Brief for Appellee and Cross-Appellant Matson Navigation Company

FOREWORD

In each of these consolidated cases, Matson Navigation Company was the respondent in the District Court pursuant to libels filed by the former crew members of the *SS Malama,* a merchant vessel owned by Matson Naviga-

tion Company and operated by it for the United States of America as charterer. These libels asserted claims for bonuses and maintenance during internment of these crew members while on land subsequent to the destruction of the vessel by the armed forces of Japan.

Matson Navigation Company answered the libels and at the same time impleaded the United States of America as a party respondent based upon the charter party provisions whereby the United States of America agreed to indemnify Matson Navigation Company for certain items included in which, it was alleged in the impleading petition, were war bonuses and maintenance claims. The United States of America in its answers to the impleading petitions admitted that as between it and Matson Navigation Company it was liable for any war bonus claims, but denied that it was liable for any maintenance claims.

At the trial, under stipulation of counsel approved by the court, this subsidiary question of the liability for maintenance was deferred pending determination of the issues between the libelants and the respondent. In view of the trial court's decision, it became unnecessary for it to determine this subsidiary question. However, in order to protect its rights in the event of a reversal by this court, and as a precautionary measure, notwithstanding what we conceive to be the true rule that an admiralty appeal is a trial de novo, Matson Navigation Company took cross-appeals from the final decrees adjudging that it recover nothing from the United States of America either on the bonus claim or on the maintenance claim.

In view of the fact that the United States of America admitted that it was liable for bonuses, if any were due,

the burden of presenting the case on this issue has been undertaken by proctors for the United States of America, both in the trial court and in this court. We therefore do not propose to further burden this court with any discussion of this particular issue, but merely wish to make the statement that Matson Navigation Company concurs in and adopts as its own the brief which is being filed on behalf of the United States relative to the bonus issue.

This brief, therefore, will be devoted solely to a discussion of the maintenance issue and very briefly to the cross-appeals.

ARGUMENT

Appellants Are Not Entitled to Any Recovery for Maintenance.

It may first be noted that the respective briefs for the appellants cover the maintenance claim in a hap-hazard manner, to say the least. Both briefs indicate that counsel feel that the decision of this court in the *President Harrison* case (*Agnew v. American President Lines, Ltd.*, 177 F.2d 107) is controlling on the question as indeed it is. There is no evidence in the record to indicate that the men were not subsisted by the Japanese during their internment, and in the absence thereof and as pointed out by this court in the *President Harrison* cases, there can be no liability upon the ship owner for such. In view of this court's decision in the *President Harrison* cases, it seems unnecessary to proceed with a lengthy argument on this question. All of the arguments which can be advanced were presented to this court by counsel for American President Lines in the *President Harrison* cases. We think it pointless to take up the time of the court to present those arguments again.

However, counsel for the appellants in the *Armstrong* and *Currie* cases urge an additional reason for the allowance of maintenance, to wit, that a deviation occurred, thereby entitling the seamen to an allowance for maintenance. This theory of deviation was also advanced by counsel for the same appellants insofar as it relates to bonuses and we believe that the point is sufficiently disposed of in the brief for the United States of America. Insofar as it relates to maintenance, we do point out that the cases cited by these appellants do not support the proposition for which they are cited. The cases of *Sheppard v. Taylor,* 30 U.S. 675 and *Turtle v. Northwestern Steamship Company,* 154 Fed. 146, 162 Fed. 256, make no mention whatever of the subject of maintenance and were merely actions, in the first case, for wages only and in the second case for damages. In *The Kentra,* 286 Fed. 163, the vessel was still in existence and the libelant left the ship upon the deviation and the court held he was entitled to wages and damages until repatriated. It is submitted that that is an entirely different proposition from the present case, where the voyage was admittedly frustrated by the loss of the ship. As held in *Newman v. U. S.,* 50 F. Supp. 66, the fact that a seaman may be legally entitled to wages does not mean that he is also entitled to subsistence.

In conclusion, it should be noted that this so-called doctrine of deviation is only advanced by counsel in the *Armstrong* and *Currie* cases. Apparently, counsel in the *Stewart* case do not place any reliance upon it. Furthermore, it should also be noted that deviation was not pleaded in the libels, that no proof whatsoever was adduced at the trial, and finally that the libel in the *Stewart* case bases the claim for maintenance solely on the collective bargaining agreements and not upon the Articles.

BRIEF ON CROSS-APPEAL

STATEMENT OF JURISDICTION

The original libels in each of these cases were brought in admiralty by the respective seamen involved and the District Court, of course, had jurisdiction under then Section 41(3), now Section 1333, of Title 28, United States Code. Respondent Matson Navigation Company impleaded the United States of America pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C. 741, et seq. (Apostles in *Armstrong* case, pp. 27-52[1]). Final decree in all actions which had been consolidated was entered March 24, 1949 (Apostles, pp. 99-102). Notice of cross-appeal was filed in all cases on June 22, 1949 (Apostles, pp. 123-124). Orders allowing cross-appeal in all cases were entered the same day (Apostles, p. 118), pursuant to petitions for cross-appeal, which were likewise filed on that day (Apostles, p. 117). Citations on cross-appeal were likewise served and filed on the same day (Apostles, pp. 121-122). The record was filed and the appeals and cross-appeals docketed in this court on September 12, 1949 (see cover sheet to Apostles).

The appeals were therefore timely taken (28 U.S.C. 2107) and timely docketed (see Order Extending Time for Filing Apostles on Appeal and Cross-appeal filed July 12, 1949, Apostles, pp. 128-129, and as set forth on pages vi and vii of the Appendix to the brief for appellants in the *Armstrong* and *Currie* cases). The jurisdiction of this court to review the final decree of the District Court was therefore sustained by 28 U.S.C., Sections 1291 and 1294.

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(1) For the sake of brevity, references to the record will be confined to the record in the *Armstrong* case, where the same situation prevails in all cases.

STATEMENT OF THE CASE

The liability of the United States over to Matson Navigation Company is based upon the charter party of the vessel dated as of November 24, 1941, and the addendum No. 1 thereto dated as of December 20, 1941, which are annexed to the impleading petitions as Exhibit A (Apostles, pp. 31-52). This charter party provided that the United States of America as charterer agreed to reimburse Matson Navigation Company as owner "for its actual out-of-pocket expenses for any war bonuses, extra wages based on the areas to be traversed during, or the ports of call of, the voyage * * * where such bonuses and extra wages are payable by the Owner to the master, officers or crew in accordance with ship's articles or Owner's collective bargaining agreements" (Article 1.06 of Charter) (Apostles, p. 33). The charter party likewise provided, in Article 2.06, that the charterer should pay for "all other charges and expenses whatsoever except those which, by the terms of this Charter, are specifically made payable by the Owner." (Apostles, p. 38). In no place in the charter is it specifically provided that maintenance during internment of the crew on land is payable by the owner, and accordingly it is the contention of Matson Navigation Company that under these provisions, both bonus and maintenance are for the account of the charterer, United States of America.

In view of the fact that the trial court, pursuant to the stipulation of the parties, did not pass upon the liability of the United States to Matson Navigation Company because it held that the libelants were not entitled to recover anything, the Findings and the Final Decree provided that

Matson Navigation Company should not recover anything from the United States of America either for bonus or for maintenance. If this court should reverse the District Court on either the bonus or the maintenance questions, cross-appellant Matson Navigation Company felt that if it had failed to take cross-appeals it might be determined later that it had lost any rights which it might otherwise have had against the United States of America and accordingly these cross-appeals were filed. It should be noted that because of the stipulation of counsel in the trial court, approved by that court, no evidence whatsoever was adduced, nor was this question of subsidiary liability even argued. Accordingly, if this court should reverse the District Court on the question of bonus, it is submitted that it should direct that a decree be entered adjudging that Matson Navigation Company recover from the United States of America any amounts which it is held liable to pay to the respective libelants because the United States admits that it is liable on that issue. If this court should also reverse the District Court on the question of maintenance, then we submit that as no evidence whatever was taken upon this issue, this court should remand the case to the District Court for determination of this subsidiary liability.

We, of course, maintain that the decree should be affirmed in all respects, in which case these subsidiary issues then become moot.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON

The cross-appellant relies upon both of the two errors assigned, namely No. I and No. II (Apostles p. 126).

ARGUMENT OF THE CASE

1. In the Event That This Court Should Reverse the District Court on the Question of War Bonus, It Should Direct that the United States of America Be Held Liable to the Cross-Appellant for the Amount Thereof.

Assignment of Error No. I: "In the event that the Court of Appeals should conclude that libelants are entitled to recover from respondent any sum as war bonus during their internment on land, then the District Court erred in concluding that respondent is not entitled, and in failing to conclude that it is entitled, to recover anything from the impleaded respondent, United States of America, in such respect" (Apostles p. 126).

In view of the fact that the United States admits in its answers to the impleading petitions that it is liable for war bonus (Apostles p. 53), it follows quite naturally that in the event this court should determine any war bonus is payable, it should be held liable to Matson Navigation Company for any sums which it might have to pay to the respective libelants. We note that there is no dispute between Matson Navigation Company and the United States of America on this point, and it seems pointless to argue it any further.

2. In the Event That This Court Should Reverse the District Court on the Question of Maintenance, It Should Remand the Case to the District Court for Determination of the Issue of Whether Matson Navigation Company Is Entitled to Recover for Same from the United States of America.

Assignment of Error No. II: "In the event that the Court of Appeals should conclude that libelants are entitled to recover from respondent any sum as an allowance

for maintenance for any period subsequent to January 1, 1942, then the District Court erred in concluding that respondent is not entitled, and in failing to conclude that it is entitled, to recover for same from the impleaded respondent, United States of America, in such respect'' (Apostles p. 126).

As has been pointed out above in the Statement of the Case, the question of the liability of the United States to Matson for maintenance, if any is recovered by the libelants, was not passed upon by the trial court, no evidence was adduced and no argument was had because of the stipulation of counsel for the respective parties. Accordingly, if this court should conclude that the libelants are entitled to any maintenance, there would be no record upon which it could determine the subsidiary question between Matson Navigation Company and the United States. It seems to us, therefore, that the only logical procedure to follow would be to remand the case to the District Court for the determination of this issue.

CONCLUSION

We therefore respectfully submit that the decree of the District Court should be affirmed in all respects, but if this court should reverse the District Court on the bonus issue it should direct a decree that Matson Navigation Company is entitled to recover from the United States of America any amounts which it is held liable to pay for war bonus, and that if this court should also reverse the District Court on the maintenance issue it should remand that phase of the case to the District Court for determination of the issue as to whether the United States of America is liable to Matson Navigation Company for any sums which the latter is held liable to pay for maintenance.

Dated at San Francisco, California,
December 30, 1949.

Brobeck, Phleger & Harrison,
Alan B. Aldwell,
Proctors for Appellee and Cross-Appellant Matson Navigation Company.